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JURISDICTIONAL STATEMENT

Appellants brought the underlying action against respondents seeking monetary, injunctive and equitable relief arising out of a partnership and joint ownership of real property in Jackson County, Missouri. Respondents filed a two-count counterclaim seeking partition of the real property and winding up of the partnership. The Circuit Court of Jackson County, Missouri entered two separate judgments on January 11, 2002, one entitled Final Order and Judgment of Partition of Real Estate (dealing with Partition exclusively) and the second, Final Judgment (dealing with Plaintiffs' Counts I through XXII). These Judgments became final with the entry of the Judgment of Dismissal of Count II of respondents' Counterclaim for Winding Up of Partnership on October 17, 2003.

The Missouri Court of Appeals, Western District, issued its opinion on October 19, 2004. Appellants' timely Motion for Rehearing and an Alternative Application to Transfer were denied on November 23, 2004. Appellants filed their Application for Transfer with this Court on December 7, 2004, said Application being granted by this Court's Order of January 25, 2005. Jurisdiction of this cause is now properly in the Supreme Court of Missouri pursuant to Article V, § 10 of the Missouri Constitution and Rule 83.09 of the Missouri Rules of Civil Procedure.

This Court, pursuant to Article V, § 10 of the Missouri Constitution and Rule 83.09 of the Missouri Rules of Civil Procedure, now has jurisdiction as to all issues the same as if on an original appeal.

STATEMENT OF FACTS[1]

In 1985 the principal parties to this partnership dispute formed Broadway-Washington Associates, Ltd. ("Broadway-Washington"), a Missouri limited partnership, to own and develop certain real estate in downtown Kansas City and referred to herein as "Block 105 Properties." Their efforts to redevelop the Block 105 Properties did not succeed and it has been operated as a surface parking lot throughout the relevant time period.

A. The Parties

Plaintiff-Appellant Sangamon Associates, Ltd. ("Sangamon") is a Missouri limited partnership formed in 1985 for the specific and limited purpose of serving as a general and limited partner in Broadway-Washington. Plaintiff-Appellant Dale E. Fredericks ("Fredericks") is an individual and the managing general partner of Sangamon. Sangamon and Fredericks are sometimes collectively referred to herein as "Plaintiffs."

Defendant-Respondent Allan R. Carpenter was an individual who died in late 2000. During all relevant time periods he acted in various capacities on behalf of all other defendants,[2] collectively referred to herein as "Carpenter." On September 26, 2001,

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[1]In this brief "TR" refers to trial transcript of the date indicated, "LF" refers to Legal File, "Sup.LF" to Supplemental Legal File, and "TX" refers to trial exhibits.

[2]Allan Carpenter testified that he was the president of Carpenter-Vulquartz Redevelopment Corporation ("C-V"). 7/16/98 TR 714:16-24. C-V was owned by Allan Carpenter, his wife and three children. 7/16/98 TR 873:13-874:7. Allan Carpenter was

Theodora D. Carpenter was substituted as counterclaim plaintiff for partition pursuant to a "Suggestion of Death" filed by Carpenter's counsel. Sup. LF 131.

Both Carpenter and Fredericks were lawyers, admitted to practice in California, but their involvement with the Block 105 Properties was a business relationship.

Defendant-Respondent Broadway-Washington is a Missouri limited partnership formed by Carpenter and Fredericks in 1985 to acquire, own and develop the Block 105 Properties. Appendix A27-A30. Defendant-Respondent The Carpenter 1985 Family Partnership, Ltd., is a Missouri limited partnership formed by the Carpenter family to act as a general and limited partner in Broadway-Washington. Defendant-Respondent The Carpenter 427 W. 12th Street Family Partnership, Ltd., is a Missouri limited partnership that owned, at all relevant times, the office building and improvements at 427 W. 12th

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the general partner of The Carpenter 1985 Family Partnership, Ltd., which was the managing general partner of Broadway-Washington Associates, Ltd. 7/16/98 TR 692:12-693:10. He designated DuPage Properties, Inc., (of which he was president, 8/21/97 TR at 11-12) as general partner of Golden Gateway Building Company ("GGBC"), a California partnership, and negotiated both the purchase and potential sale of the 12th & Broadway property to/by GGBC in 1988 and 1994. 7/16/98 TR 890:6-891:14. St. Francis Associates and Fleishacker Properties (in which Mortimer Fleishacker is a general partner) were other general partners of GGBC and are defendants-respondents on the basis of vicarious liability for the actions of their partner GGBC (controlled by Carpenter).

Street in Kansas City, Missouri. 7/16/98 TR 887:1-7. Defendant-Respondent Carpenter-Vulquartz Redevelopment Corporation ("C-V") is a Missouri corporation that owned, at all relevant times, the land on a portion of Block 105 at 427 W. 12th Street. 7/16/98 TR 886:22-25.

B. The Parties' Relationship and Investment in Block 105 Properties

Under the Broadway-Washington Partnership Agreement, Allan Carpenter, through his family's limited partnership The Carpenter 1985 Family Partnership, Ltd., was to serve as managing general partner (and limited partner) and own a 60% interest in Broadway-Washington. Sangamon, the Fredericks' family partnership, owns 25% of Broadway-Washington and is both a general and limited partner. The third partner, Edgar Carpenter, Allan's brother, later sold his 15% interest to Allan. Broadway-Washington's limited purpose was to own and develop the Block 105 Properties with office buildings, described in the partnership agreement as "Projects." Appendix A27-A30; TX 1, 7/16/98 TR 693:11-694:11.

A separate "Management Agreement" between Broadway-Washington and C-V, a Carpenter-owned entity, provided that C-V would manage Broadway-Washington's contemplated Projects, namely "garages and office buildings" that were the subject of a "Request for Proposals" issued by the Kansas City Redevelopment Authority. Appendix A57-64. The parties' proposal to the Authority was not accepted, and subsequent efforts to develop and construct a major office building were unsuccessful. In late 1986, development efforts were abandoned and Broadway-Washington wrote off incurred

costs. TX 219; 7/16/98 TR 757:15-758:11. The issues addressed at trial involved the failed Projects and Carpenter's handling of partnership monies, as discussed *infra*.

This dispute involves two parcels of property, both on the 1200 block of Broadway. In 1988, by agreement of the partners, Carpenter purchased from the Broadway-Washington partnership a portion of its property generally located at the corner of 12th & Broadway (the "North Broadway Property"). Then in December 1991, Fredericks purchased a 10% interest in the North Broadway Property for slightly over $100,000. 8/19/97 TR 65-72; 7/15/98 TR 493:24-494:25; TX 11, 12, 13, 14, 15. The North Broadway property was thereafter owned 90% by one of Carpenter's entities, Golden Gateway Building Co., and 10% by Fredericks through an Individual Retirement Account ("IRA"), as tenants-in-common. *Id*. The other parcel (which came to be known by the parties as the "Mid-Broadway Property") continued to be owned by Broadway-Washington. The Mid-Broadway Property is adjacent to and immediately south of the North Broadway Property.

It is undisputed that since 1985 all of the land owned by the parties has been utilized as a surface parking lot (except for a separate office building on an adjoining parcel owned by the Carpenter family). Daily operation of the parking lot business was farmed out to a third party which remitted cash monthly to Broadway-Washington after retaining a percentage of gross collections as its fee. The independent operator paid all operating expenses including insurance (but not real property taxes). This arrangement pertained throughout the entire time period at issue. 7/6/98 TR 907:4-911:10.

After the 90/10 ownership arrangement was entered into in 1991, the North Broadway Property and Mid-Broadway Property continued to be operated as a single parking lot, and Carpenter continued to manage all aspects of the business. 7/17/98 TR 986:8-988:20. Fredericks did not have control of either the North Broadway Property or the Mid-Broadway Property, nor was he in control of the Broadway-Washington partnership. Carpenter had control and more than 75% ownership of the business interests.

C. Procedural History

Beginning in 1994, Fredericks and Carpenter began to experience difficulties in their partnership. Carpenter filed a lawsuit against Fredericks in San Francisco, California, in April 1995, in which he sought damages in excess of $10 million for alleged fraud and other alleged wrongful acts relating to the Block 105 Properties. This action was resolved in favor of Fredericks on summary judgment. The California Court of Appeals, in a 1999 unpublished opinion, affirmed. 2nd Sup. LF 6-13, 146-167.

1. Pleadings

Plaintiffs filed the original Petition from which this appeal arises in July 1995, amended to the Second Amended Petition set out in twenty-two counts including direct and derivative causes of action. Plaintiffs' counts included claims for breach of fiduciary duty, judicial accounting, production of partnership records, breach of contract, removal of managing partner, imposition of constructive trust, appointment of receiver, conversion, civil conspiracy, defamation and interference with business relations. LF 1-126.

Plaintiffs' complaints against Carpenter generally alleged:

1. undisclosed self-dealing and stripping the partnership of cash;
2. filing but not disclosing a separate lawsuit against Broadway-Washington wherein Carpenter, as a representative of the partnership, stipulated to a $224,355 default judgment in his favor;
3. failure to pay Fredericks' IRA its share of monies generated from operation of the parking lot business;
4. failure to disclose material partnership information, books and records of the partnership, including financial information regarding operation of the parking lot business; and,
5. other acts amounting to exclusion of the minority general partner from partnership affairs.

Defendants filed an Answer to plaintiffs' Second Amended Petition and a two count Counterclaim. LF 138-193. The Counterclaim requested, in Count I, the partition of real estate (the North Broadway Property), and in Count II, court supervised winding-up of the affairs of the Broadway-Washington partnership. Sangamon and Fredericks filed a Reply denying all material allegations and asserting affirmative defenses. LF 237-56. Count I was pursued to the Final Judgment of Partition as described below. Defendants' second claim, for winding up of partnership affairs was dismissed in open court by counsel for Carpenter and was not pursued further.

2. <u>Trial</u>

The Trial Court began trial before a jury in August of 1997. On September 2, 1997, at the close of plaintiffs' evidence, the Trial Court directed verdict in favor of defendants on plaintiffs' claims for defamation, civil conspiracy and interference with business relations, and then severed plaintiffs' remaining claims and defendants' counterclaims for bench trial. 9/2/97 TR 1062-1081. In the Summer of 1998 and throughout the Spring of 1999, trial resumed, without a jury, hearing evidence on days set periodically by the court.

On January 14, 2000, the Trial Court entered an interlocutory judgment addressing all of plaintiffs' twenty-two counts. LF 496-502. Two years later the Trial Court entered final judgments. Appendix A1-8.

3. <u>Partition History</u>

The Final Order and Judgment of Partition of Real Estate was entered on January 11, 2002. Appendix A7-8, LF 612. Prior to that date, in brief, the following occurred:

1. At the conclusion of the bench trial, the Trial Court entered an Interlocutory Order of Partition and Order of Sale, requiring public sale of the tenancy-in-common property. LF 368, 369.
2. Public sale was conducted by the sheriff on June 17, 1999. LF 375, 376.
3. Following the sheriff's sale, a Report of Sale was filed, LF 375, and Fredericks filed a motion to set aside the sale. LF 377-424.
4. Following two days of hearings, the Trial Court set aside the partition sale on the ground the price bid by Carpenter was so low it "shocked the conscience of the court." LF 491-94.

5. Defendants then filed a Notice and Motion for Appointment of Partition Commissioners. LF 504-06. That motion was never ruled upon. On January 11, 2002, with no further hearings or rulings, the Trial Court entered the Final Order and Judgment of Partition of Real Estate. Appendix A7-8; LF 612, 613. This Order reversed the January 2000 Order that set aside the sheriff's sale, and reinstated that sale but increased the price, at the suggestion of Carpenter and over the objection of Fredericks, to $32 sq. ft.

4. Final Judgments

Plaintiffs appeal from two judgments (both entered on January 11, 2002) entitled Final Order and Judgment of Partition of Real Estate ("Judgment of Partition") and Final Judgment, dealing with Counts I through XXII of plaintiffs' Second Amended Petition. These judgments became final with the entry of the Judgment of Dismissal of defendants' Count II (Winding Up of Partnership) on October 17, 2003.

D. Evidence of breach of fiduciary duty by Carpenter

The evidence of undisclosed self-dealing by Carpenter, and numerous acts amounting to breach of fiduciary duty is extensive and overlapping, and the order of their discussion does not rank them by relative significance. As more evidence of Carpenter's self-dealing became known, plaintiffs made multiple applications for appointment of a receiver. Unless otherwise indicated, the evidence consists entirely of Carpenter testimony and documents produced or created by Carpenter entities.

1. Unauthorized Payments and Charges

a. Town House Expenses

Carpenter leased, in his own name, a town house for use when in Kansas City on his C-V business. 8/21/97 TR 746; 7/16/98 TR 786:11-787:22; TX 247, 248. After partnership records were ordered produced in late 1995, they reflected that Broadway-Washington had paid 100% of the town house rent, utilities, furnishings and insurance which, as of July 1997, amounted to $119,532. 8/21/97 TR 746; TX 190, 7/98 TR 139:22-140:5; 7/98 TR 146:21-148:8; 525:18-25. Plaintiffs contested these personal expenses being charged as partnership expenses. The Final Judgment was in favor of Sangamon regarding these improper charges to Broadway-Washington, and it has not been appealed. Appendix A2, at ¶7, LF 620.

b. Office Rent Charges

C-V owned an office building adjacent to the Broadway-Washington properties. Carpenter paid C-V, or caused the partnership's books to reflect accrued expenses due C-V, for rent on a 1,500 square foot suite in that building commencing in 1985. The office suite in question was the same office utilized by C-V. Broadway-Washington was charged $18,000 in annual rent, an amount determined by Allan Carpenter. 7/17/98 TR 930:17-932:16. The partnership agreement prohibited charges to the partnership by the partners. Appendix A40-41.

Carpenter claimed the rent charges were justified by a provision in the Management Agreement (App. A57-A64; TX 2), which contained a "first year budget"

reflecting such proposed payments for a "Project" as defined therein at ¶ 2(a). Early development efforts never reached the point where there was a Project, as Carpenter admitted at trial. 7/16/98 TR 888:7-889:23 (at year-end 1986 "there was a termination of a Project that hadn't actually begun yet . . ."). John Carpenter, an officer of C-V and a partner in Broadway-Washington, testified that (1) there was never a Project for C-V to manage, and (2) the "first year budget" only applied to "an actual construction program, not a theoretical or dreamy program." 7/16/98 TR 877:6-13; 878:19-880:3. Moreover, the parties abandoned, at year-end 1986, their development efforts on the Project contemplated by the Management Agreement. 7/16/98 TR 877:5-880:3. Plaintiffs claimed that the office rent charges to Broadway-Washington were unauthorized.

Carpenter had no other agreement with the partners that he could charge rent for C-V's own office, yet he did so without disclosing the fact. Carpenter admitted he did not tell his partner Fredericks about the money he paid himself from the partnership accounts based on such charges. 7/16/98 TR 730:1-7.

By the time of the July 1998 trial, Carpenter had charged Broadway-Washington $118,500 in office rent for 1987 through 1994. A total of $33,000 was taken out in cash in 1993 and 1994, *but not disclosed until late 1995, after this litigation ensued.* 7/16/98 TR 738:19-739:21. Some $85,000 was shown on partnership records created in 1995 as "accrued" and owing to Carpenter.[3] TX 189, 190, 191, 192, 194; 7/13/98 TR 101:10-

[3] The Broadway-Washington partnership agreement expressly provided that its financial records would be maintained on the "cash method of accounting" whereby all revenues

102:1; 7/17/98 TR 977:10-979:12. Carpenter concealed the 1993 cash rent payments by not mentioning them on the partnership's 1993 tax return. He disguised the 1994 cash rent payments by not reporting them until his accountant prepared the 1994 tax return in October 1995 (after this suit was brought). *Id*.

The 1995 "accruals" of office rent charges were based upon previously undisclosed "invoices" from C-V to the partnership for the years 1985 through 1993. TX 194, 195, 196; 7/16/98 TR 713:9-715:5. Carpenter admitted that those invoices were not provided to Fredericks earlier (contemporaneously), and that he had not *otherwise* disclosed to Fredericks that he was charging the partnership for office rent. 7/16/98 TR 713:9-715:19; 720:17-730:10; 767:22-769:14; 827:25-830:5. Moreover, the "accrued" amounts were not shown on the tax returns or otherwise contemporaneously disclosed to other partners, as admitted by Carpenter at trial. 7/16/98 TR 726:22-730:10, 738:19-739:21; TX 185, 186. *See also* 7/15/98 TR 518:4-17; 7/17/98 TR 1135:25-1139:9. The

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and expenses are recorded as cash received and paid during the year. Appendix A27-A56; TX 1 at page 18. In 1995, Callahan (Carpenter's accountant) was asked to prepare new financial statements from inception in 1985, using the *accrual basis of accounting.* 7/17/98 TR 969:13-25. Callahan testified that in this case the results were "drastically different" compared to the cash method of accounting. He utilized the accrual method because "the attorneys in Kansas City wanted an accrual financial statement" (referring to Carpenter's attorneys). 7/17/98 TR 970:18-971:19.

only financial reporting Carpenter made to the partners consisted of annual income tax returns.

2. Office Support Services

Carpenter similarly paid himself, or one of his owned entities, various amounts for claimed "office support services" without disclosing the charges and/or obtaining other general partners' consent. Carpenter charged the partnership $49,800 for the years 1987 through 1994 for "services." A total of $7,600 was taken out in cash in 1993 and 1994 and $42,000 "accrued" (in 1995, after this suit was brought) and was shown as owing by the partnership to Carpenter. 7/17/98 TR 977:10-979:12; TX 188, 189, 190, and other citations *supra*. Carpenter's daughter testified that she determined the amounts to be charged each year for these "services." 7/16/98 TR 917:1-6. However, there never was a Project for which C-V needed to provide "office support services" under the Management Agreement or otherwise. 7/16/98 TR 887:6-887:13, 878:19-880:3. John Carpenter testified that the only person who provided what he described as "ministerial" support services was his sister, who did so in her capacity as a partner in The Carpenter 1985 Family Partnership, Ltd., and *not* as a representative of C-V. 7/16/98 TR 880:12-884:14; 904:22-920:11; 7/13/98 TR 111:23-113:24. Yet it was C-V that billed Broadway-Washington for the claimed services.

3. Filing But Not Disclosing Separate Lawsuit and Stipulated Judgment Against Partnership to Collect Accrued Expenses

In early 2000, plaintiffs discovered that Carpenter's corporation, C-V, had filed a separate lawsuit in April 1999, in the Circuit Court of Jackson County, Missouri

(assigned to Judge Daugherty) against Broadway-Washington. C*arpenter-Vulquartz Redevelopment Corporation v. Broadway-Washington Associates, Ltd.*, Case No. 99 C-V 213763, filed April 16, 1999. The suit was for "accrued" charges and expenses, described *supra*, in excess of $200,000. 2nd Sup. LF 204-348, 349-364. This lawsuit was filed while the same issues (disputed charges for office rent, support services, etc.) had been the subject of a trial and were under submission to Judge Shinn in the instant case.

The lawsuit against Broadway-Washington was not disclosed to the Trial Court or plaintiffs. Rather than serve this "secret" lawsuit on Broadway-Washington's registered agent (who would have notified all the general partners), Carpenter's attorney, Rhonda Smiley, filed a voluntary appearance as defense counsel for Broadway-Washington. In a very short time frame, and without notice to Fredericks, Smiley filed an Answer, and then she and Carpenter executed a "Stipulation and Confession of Judgment" in favor of C-V in the amount of $224,335 plus interest. 2nd Sup. LF 204-348. This sham litigation and confession of judgment remained undisclosed to Fredericks or Judge Shinn until its discovery by plaintiffs' counsel in early 2000.

Following discovery, plaintiffs promptly filed a motion to vacate and set aside the secret judgment on the grounds of fraud. The motion was granted by Judge Daugherty and the secret judgment was set aside on December 18, 2000. LF 532, 533; Appendix A 72-73.

4. Stripping Cash from Partnership and Failure to Pay Fredericks' IRA

Beginning in 1993, Carpenter began systematically stripping nearly all available cash from the partnership bank accounts. Carpenter admitted he did not tell his partner Fredericks about the money he had taken. 7/16/98 TR 730:1-7 ("Well, I didn't tell him anything"). In a seven month period beginning in mid-1993, Carpenter wrote checks to C-V for amounts in excess of $74,500 leaving the partnership accounts nearly bare.[4]

After Fredericks purchased a 10% undivided interest in the 12th & Broadway parcel, Carpenter initially recognized his obligation to share 10% of its revenues with the

[4] On July 9, 1993, Carpenter wrote a check to C-V for $19,900 from the partnership's Funds Management Account, leaving a balance of $3,318. 7/16/98 TR 720:17-722:22; 7/15/98 TR 508:9-23; TX 206, 211. On September 7, 1993, he took $4,000 from that account, leaving a balance of $54. 7/16/98 TR 723:13-726:17-21. On January 20, 1994, he took $7,650 from the Operating Account, leaving only $49. 7/16/98 TR 732:5-733:24. At that time there was only $37 in the Funds Management Account. In July 1995, shortly after bringing his first California lawsuit, Carpenter took $25,000 from the partnership's Funds Management Account leaving $143 in that account. On the same day, he took $1,500 from the Operating Account leaving only $71. TX 213, 214; 7/16/98 TR 737:4-738:9; 7/15/98 TR 515:23-516:10. Carpenter did not dispute these facts or events. 7/16/98 TR 732:5-733:24; 7/15/98 TR 510:11-511:12; TX 206, 212.

IRA. TX 16. In 1992, Carpenter reported that he was holding the IRA's 10% share on "account":

> we reflect a credit (not distributed) of $460.37 to the account of your IRA as its share of the distribution attributable the [sic] 10% interest in the property at 12th and Broadway…

TX 16. Fredericks' IRA was never paid this or any other amount. In 1994, after a dispute arose over failed negotiations to sell the property, Fredericks requested that his IRA be paid its share of monies from parking lot operations. Appendix A65-A67, A68-A71; TX 45, 46, 47; 7/15/98 TR 486:25-489:13, 497:13-497:16. Carpenter did not reply. Instead, he wrote a check payable to "Law Offices of Allan R. Carpenter" for $16,000 from the partnership's Funds Management Account leaving $1,045 in the account. Carpenter did not dispute this at trial. 7/16/98 TR 734:22-736:16; 7/15/98 TR 513:4-514:21; TX 203, 204. Based on the partnership's bank account records, *there was no cash left with which to pay the IRA because Carpenter systematically stripped it clean*. TX 191, 192, 193; 7/16/98 TR 741:5-751:19; 955:1-956:14. The Final Judgment is in favor of Fredericks with respect to monies owed the IRA. Appendix A4 at ¶ 13. Carpenter did not appeal from that judgment.

5. Refusal to Cooperate in Prospective Sale of Property

As this action progressed, at various times Judge Shinn urged the parties to agree on a method for selling the property. There were opportunities to sell. By this time Carpenter had already dissolved Broadway-Washington and testified that he was in the

process of "winding up" its affairs. 8/21/97 TR 709; 7/16/98 TR 693, 695. Carpenter listed the property for sale. At a hearing on January 8, 1998, Carpenter's counsel conceded that her client "has a fiduciary duty to get in there in good faith, more than good faith as a fiduciary to get in there in good faith and respond to these offers [offers from potential purchasers]." 1/8/98 TR 33:1-5.

Carpenter failed to deal with prospective purchase offers in good faith. The listing real estate broker, Ronald Jury ("Jury") (retained by Carpenter and separately by Fredericks), testified that DST Realty, Inc., a Kansas City real estate developer, and Centex, a national real estate developer, each made offers to purchase the Block 105 Properties. 7/14/98 TR 339:2-7, 350:23-351:5, 358:6-359:1. DST initially offered $1,552,260 (about $30/sq ft) in late 1997. Fredericks responded with a suggested counter-offer, but Carpenter refused to make a counter-offer, quibbled about the offer terms and declined to renew his listing agreement. *Id*.; 7/14/98 TR 362:16-19, 334:14-334:6, 362:19-365:19; TX 339, 340, 341. DST made a renewed offer to which Fredericks responded but Carpenter would make no counter-offer. *Id*.; 7/14/98 TR 336:3-21, 362:19-365:19; TX 317, 318, 327, 342.

Centex began dialogue by requesting basic information to evaluate the site for a possible hotel. *Id.;* 7/14/98 TR 359:13-340:2, 341:15-22. Carpenter responded by writing a letter to Jury: "you may not proceed with this inquiry on behalf of Allan Carpenter or Broadway-Washington Associates, Ltd." TX 345, 347; 7/14/98 TR 362:19-365:19. Jury contacted Fredericks who supplied the requested information. *Id*.; 7/14/98 TR 339:13-341:3, 341:23-344:9. Centex representatives toured the site and submitted a

written offer to purchase the property for $1,810,975 but required a response within ten days. TX 333; 7/14/98 TR 349:12-25, 375:12-376:2. Carpenter did not respond to the offer. *Id.*; 7/14/98 TR 349:4-350:22, 353:22-354:1. Fredericks suggested a counter-offer figure, and proposed that a sale be made "subject to court approval." TX 334; 7/14/98 TR 351:6-353:21. Centex responded with an increased offer of $2,328,397 (about $45/sq ft) or 50% more than the earlier DST offer. TX 336; 7/14/98 TR 354:2-355:6. Carpenter did not respond further. Fredericks responded on behalf of the IRA and Broadway-Washington with a counter proposal of $2,845,791 (about $55/sq ft), subject to court approval. TX 335; 7/14/98 TR 355:19-356:16; 344:10-349:3. Carpenter responded with letters to Jury stating that he [Jury] "was setting himself up for an embarrassing situation if not a liability producing situation" and demanded that Jury remove his "For Sale" sign from the property (even though the listing agreement Fredericks had signed was still in effect), and claimed that the sign was a "material misrepresentation of fact" and constituted "willful trespassing and surely is a violation of your license." TX 349; 7/14/98 TR 362:19-365:19; TX 353; 7/14/98 TR 362:19-365:19, 369:15-366:22.

In the face of all this, Jury resigned his listing agreement citing "possible litigation against my firm" and announced that he would advise interested parties that the properties were not for sale pending resolution of this litigation. TX 354. Centex expressed to Jury continuing interest in constructing a hotel on the site. *Id.*; 7/14/98 TR 356:17-357:15.

6. Purchase of Partnership Property at Undisclosed Loss to Partnership

As indicated above, in 1988 Carpenter purchased the North Broadway parcel from Broadway-Washington in a transaction agreed to by the partners. But the acquisition of that property was to result in no loss to the partnership. In other words, the purchase price was to be the partnership's tax basis in the property. 7/16/98 TR 955:15-23; TX 189. Yet this is not the way Carpenter handled the purchase and sale as representative of both purchaser and seller. TX 7, 8, 9; 7/16/98 TR 890:6-891:14. The partnership's acquisition cost for the North Broadway property was $725,000 but $50,000 of that amount was deferred and still owed to the original sellers. Rather than pay Broadway-Washington the full amount, Carpenter paid $675,000 for fee simple title (and did not expressly assume the outstanding indebtedness). The result was a $50,000 loss to the partnership.[5] Carpenter also charged the partnership "accrued interest" of $20,650 (as of year-end 1995) on the $50,657 amount. TX 192, note 6. There was no evidence that the other partners were aware of or agreed to allow the partnership to sustain this loss.

[5] Carpenter later was forced to pay the original sellers their deferred amounts, but turned around and sought to charge Broadway-Washington $50,658. Carpenter put this loss on the partnership. 7/13/98 TR 158:6-165:19; 166:5-24; TX 189, and accompanying table.

7. Other Expenses

As of mid-1997, Carpenter had caused Broadway-Washington to pay $4,389 for his litigation expenses in this proceeding, and "accrued" another $33,066. 7/16/98 TR 955:24-956;14. TX 189, 191, 192, 193, 253, 254, 401; 7/16/98 TR 796:5-802:17; 7/17/98 TR 1031:1-1032:20. These actions (presumably ongoing) demonstrate Carpenter's unhesitating use of partnership funds for his personal benefit.

POINTS RELIED ON

I. The Trial Court erred in entering the Final Order and Judgment of Partition of real estate because:

A. the Trial Court failed to follow the procedure established by Mo. R. Civ. P. 96 in that the Trial Court set the price for the real estate without conducting a public judicial sale in accordance with the requirements of Mo. R. Civ. P. 96 and Mo.Rev.Stat § 528.010 *et seq.*, and exceeded its authority by setting a price suggested by defendants but not set by bid at a sheriff's sale pursuant to Rule 96.

Cases

Mo. R. Civ. P. 96 *et seq.*

Mo. Rev. Stat. §528.010 *et seq.*

Darrington v. George, 982 S.W.2d 823 (Mo. App. W.D. 1998)

Vickers v. Vickers, 762 S.W.2d 482 (Mo. App. E.D. 1988)

Forney v. Forney, 926 S.W.2d 889 (Mo. App. E.D. 1996)

B. Carpenter's unclean hands bar him from obtaining the equitable remedy of partition in that Carpenter engaged in wrongful conduct and self-dealing with respect to the property sought to be partitioned, and refused to cooperate in and frustrated the sale of the partnership and tenancy-in-common property.

Cases

Mo. Rev. Stat. §528.010, *et seq.*

Nelson v. Emmert, 105 S.W.3d 563 (Mo.App. S.D. 2003)

Phelps v. Domville, 303 S.W.2d 601 (Mo. banc 1957)

Cohn v. Century Venture Dev. P'ship., 938 S.W.2d 647 (Mo. App. E.D. 1997)

II. The Trial Court erred in refusing to appoint a receiver, pursuant to Rule 68.02 of the Missouri Rules of Civil Procedure, because the judgment denying the appointment of a receiver was against the weight of the evidence in that the evidence demonstrated that a receiver was necessary to protect the jointly owned property of Fredericks and Carpenter and Carpenter was engaged in a bitter dispute with and had initiated multiple lawsuits against the remaining general partners and Broadway-Washington, had breached numerous fiduciary duties, engaged in extensive self-dealing, excluded his minority general partner from partnership affairs, and failed to disclose material partnership financial and other information.

Cases

Mo. R. Civ. P. 68.02

Mo. Rev. Stat. §515.240

Goll v. Kahler, 422 S.W.2d 359 (Mo. App. W.D. 1967)

Curley v. Birgnoli Curley & Roberts Assoc., 746 F.Supp. 1208 (S.D.N.Y. 1989)

III. The Trial Court erred by entering judgment in favor of defendants on the claims for breach of fiduciary duty (counts three, eight and fifteen),

conversion (counts nine and eighteen) and constructive trust (counts ten and nineteen), because the Trial Court's judgment was against the weight of the evidence in that the evidence adduced by Carpenter established that he engaged in extensive self-dealing, refused to pay monies due to Fredericks, refused to cooperate in attempts to sell the property and excluded Fredericks from partnership affairs.

Cases

Mo. Rev. Stat. §358.210

Mo. Rev. Stat. §359.221

In re Cupples, 952 S.W.2d 226 (Mo. Banc 1997)

Knopke v. Knopke, 837 S.W.2d 907 (Mo. App. W.D. 1992)

Ebest v. Bruce, 734 S.W.2d 915 (Mo. App. E.D. 1987)

ARGUMENT

I. The Trial Court erred in entering the final order and judgment of partition of real estate because:

A. the Trial Court failed to follow the procedure established by Mo. R. Civ. P. 96 in that the Trial Court set the price for the real estate without conducting a public judicial sale in accordance with the requirements of Mo. R. Civ. P. 96 and Mo.Rev.Stat § 528.010 *et seq.*, and exceeded its authority by setting a price suggested by defendants but not set by bid at a sheriff's sale pursuant to Rule 96.

1. Standard of Review

The standard of review is set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *Murphy* provides in part: "[T]he decree or judgment of the trial court will be sustained . . . unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Id*. Reversal is appropriate when the Trial Court erroneously applies the law. *Id*.

Pursuant to *Murphy*, this Court reviews the Judgment of Partition under the standard as to whether the Trial Court either failed to apply or erroneously applied the procedure for partition actions set forth in Rule 96. *Id*. In this case, the facts establish that the Trial Court's entry of the Judgment of Partition without following the procedural

requirements of Rule 96, and the Court of Appeals decision affirming that judgment, erroneously declared and applied Missouri law governing partition actions.

2. Erroneous Judgment of Partition

On April 15, 1999, upon motion by Carpenter, the Trial Court entered an Interlocutory Order of Partition and Order of Sale ordering the public judicial sale of the tenancy-in-common property. LF 368-71. A sheriff's sale occurred on June 17, 1999, bringing a price of $100,000 bid by Carpenter, or $3.04 per square foot. LF 374, 491, 494. Following objections by Fredericks, and two days of hearings in December of 1999, the Trial Court vacated the sale on the ground the price bid was so low that it shocked the conscience of the court. Judge Shinn stated:

> [T]he June 17, 1999 partition sale on the courthouse steps is so grossly inadequate as to shock the conscience of the Court, raise a presumption of fraud, and amount to a sacrifice, . . . the dynamics concerning a judicial sale have so changed since initially ordered on April 15, 1999, that it is improvident to dispose of this parcel of property by judicial sale.

Order of January 14, 2000. LF 491-94. The Trial Court further ordered that partition proceed "in kind," pursuant to Rule 96 and that commissioners be appointed to effect the partition in kind. *Id.* However, no commissioners were ever appointed and a partition in kind advanced no further. Carpenter sought review in both the Court of Appeals as well as this Court of the order vacating the sheriff's sale. Review was denied. *State ex rel. Allan R. Carpenter v. The Honorable David R. Shinn,* S.Ct. No. 82459, denied April 25, 2000.

In May of 2001, Carpenter's successor moved that partition in kind proceed.[6] LF 504, 506. Fredericks opposed the motion (LF 508-519), and the Trial Court never ruled on it. Then, one year after setting aside the original judicial sale, and without any further formal proceedings (judicial sale, partition in kind), the Trial Court entered the Final Judgment of Partition on January 11, 2002. Appendix A7-8; LF 612, 613. In that ruling, Judge Shinn reversed his order setting aside the 1999 sheriff's sale and reinstated that sale but *sua sponte* set a new price of $32 per square foot. The Trial Court provided no factual or legal basis for this action. LF 612, 613.

3. <u>Rule 96 Requirements</u>.

Each of Missouri's appellate courts have recognized that "[p]artition of land by court action is strictly statutory, and may be affected ***only by*** the procedures set forth in rule [Mo. R. Civ. P. 96] and statute [Mo. Rev. Stat. §528.010 *et seq*.] governing partitions." *See Southhard v. Southhard*, 105 S.W.3d 560, 561 (Mo. App. S.D. 2003) [emphasis added]; *Darrington v. George,* 982 S.W.2d 823, 825 (Mo. App. W.D. 1998)[7];

[6] By this time Judge Shinn was aware of Carpenter's secret lawsuit against Broadway-Washington in which he arranged a default judgment of $224,355 in his favor, and that the default judgment had been set aside by another judge as fraudulent.

[7] In the Court of Appeals opinion reported at 982 S.W.2d 823, it appears that appellants were James George and Melissa Claire Stulz, husband and wife, and respondents were Robert Bruce and Mary Catherine Darrington, husband and wife. However, subsequent decision have consistently cited to this opinion as *Darrington v. George*. Respondents in

Forney v. Forney, 926 S.W.2d 889, 891 (Mo. App. E.D. 1996). These courts have further determined that the procedures outlined in Rule 96 must be strictly followed. *Id.* Due process under the Missouri constitution requires no less because partition involves a property interest that is subject to protection. *See generally Plant v. Plant*, 825 S.W.2d 674, 677-681 (Mo. App. S.D. 1992) (discussing whether notice by publication in partition action was sufficient to satisfy due process requirements).

Rule 96 sets forth the procedure for partitioning real estate and authorizes two methods and only two methods of partition.[8] Mo. R. Civ. P. 96*; Darrington*, 982 S.W.2d at 824. The court may partition in kind (which *requires* the appointment of three or more commissioners who issue a report detailing the proposed division of the land) or following a finding by the court that "partition in kind cannot be made . . . without great prejudice to the owners . . ." the court may order a public judicial sale without the appointment of commissioners. Mo. R. Civ. P. 96.11. No other procedure is permitted

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their brief to the Court of Appeals in this action cited to this decisions as *Bruce v. George*. Although both Bruce and George are middle names of parties in that action, Appellants, consistent with subsequent appellate decisions citing this opinion, refer to this case as *Darrington v. George* throughout this brief.

[8] Rule 96 and Chapter 528 are essentially identical. To any extent that Rule 96 and Chapter 528 may be inconsistent or in conflict, Rule 96 supersedes the statute because Rule 96 addresses practice, procedure or pleading in an action for partition. *See State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995).

by Missouri law and if this statutory scheme is not strictly followed any judicial order and/or distribution of proceeds is improper and must be reversed. *Darrington*, 982 S.W.2d at 824-825; *Vickers v. Vickers,* 762 S.W.2d 482, 483 (Mo. App. E.D. 1988). Neither Rule 96, the statute, nor *Lester v. Tyler,* 69 S.W.2d 633, 638 (Mo. 1934) contemplate a lesser standard.

There are important policy reasons that strict standards be applied. The Missouri legislature incorporated significant safeguards in the partition procedure to protect all parties with an interest in property subject to a partition action. These safeguards were designed to satisfy due process requirements in the Missouri constitution (*See Plant*, 825 S.W.2d 674), and place the decisions of how to divide the real estate in the hands of court-appointed commissioners who issue a public report, or require a public judicial sale on the courthouse steps to set the price. Private sales, or the setting of a price for real estate in the judge's chambers and out of the public eye, are not permitted. *See Darrington,* 982 S.W.2d at 825. The sheriff is required to publicly advertise the sale, conduct the sale in public, collect the purchase money from the sale, and file a report of the sale with the court. Mo. R. Civ. P. 96.19 *et. seq.*

4. <u>The Trial Court's Failure to Follow Rule 96</u>

One year after setting aside the first partition sale as being so grossly inadequate "as to shock the conscience of the Court," the Trial Court arbitrarily set a price for the real estate that was suggested by the opposing party, Carpenter, and entered its Judgment of Partition. This was done without any proceedings following Rule 96 and constitutes reversible error. Assuming *arguendo* that the Trial Court could reinstate its prior order

that partition by sale be had, which appellants do not concede, the Trial Court exceeded its authority when it unilaterally decided on a price and treated that price as though it had been bid at a lawful sheriff's sale two years earlier. This was judicial speculation and a fiction, and materially circumvents the requirements of Rule 96.

The Trial Court made its price determination following a proposal by Carpenter at what the Court of Appeals described as a "settlement oriented status conference." *Op.* at 8.[9] The price used by the Trial Court ($32 per foot) was $13/square foot less than the amount DST Realty and Centex had offered four years earlier, which was a price that Carpenter refused to discuss or negotiate. LF 377, 384-386. When DST offered $34/square foot offer in 1998, Carpenter testified it was "such a low ball offer I didn't consider their interest genuine" and that a reasonable offer would have been "something a lot more than $34." LF 384; 9/23/98 Bench TR 471:6-477:5, 491:3-491:ll, 492:7-16; 295:7-15. Carpenter rejected a later $42 offer from DST and refused to negotiate over it or Centex' $45 offer. LF 385, 392-399.

Neither Rule 96 nor the statute empower a trial court to *establish* a price for partitioned property; this can only be done at a lawful judicial sale. *See* Mo. R. Civ. P. 96 *et. seq*; Mo. Rev. Stat. § 528.010 *et seq*. Both the Rule and statute remove from the trial court authority to establish a price or, in the case of partition in kind, to establish the manner of its accomplishment. *Id*. Both types of partition must be done by means other

[9]Op. refers to the Opinion of the Court of Appeals dated October 19, 2004 and vacated by this Court's Order granting transfer.

than a decision of the trial judge. The Court of Appeals erroneously assumed that trial courts are empowered to establish a price in "extraordinary" circumstances. They are not.

The Court of Appeals affirmed the decision of the Trial Court despite concluding "the trial court took action that was not explicitly contemplated by Rule 96." *Op*. at 6. The Court of Appeals attempted to justify this deviation by stating that Fredericks was not prejudiced because the price set by the Trial Court constituted a ten fold increase in the amount bid at the June 1999 sheriff's sale. Two and one half years had elapsed between the June 1999 sale and the Trial Court entering its Judgment of Partition. The Court of Appeals was incorrect in concluding there was no prejudice.

The prejudice and harm to the property owner here is exactly the harm that Rule 96 and its underlying statute was designed to prevent. Property has been taken by court order without following the detailed procedure meant and established by the legislature and this Court, to protect a party's interest in property that is the subject of partition. It is highly prejudicial to plaintiffs to have their property sold at a price suggested by the opposing party. It is highly prejudicial to have a trial court, without legal or factual basis set a price and compel the divestiture of plaintiffs' property. To do so violates Rule 96 and plaintiffs' due process rights. Because the first bid amount of $3.04/square foot shocked the Trial Court's conscience, and it was then "improvident to dispose of this property by judicial sale," how can a trial judge determine in chambers over two years later that it is suddenly "provident" to reinstate the sale and pick an assumed price that a new judicial sale might establish? Since the first bid was "grossly inadequate," is "ten

times" that figure "adequate" two and one-half years later? Is that the current market price? A fair price? Carpenter did not believe that $45 was a fair price. The result was a forced private sale as much as one could imagine. Rule 96 does not authorize private sales in any form.

B. Carpenter's unclean hands bar him from obtaining the equitable remedy of partition in that Carpenter engaged in wrongful conduct and self-dealing with respect to the property sought to be partitioned and refused to cooperate in and frustrated the sale of the partnership and tenancy-in-common property.

In response to defendants' Counterclaim (Count I–Partition), plaintiffs asserted the defense of "unclean hands." LF 00237, 241, 242. Contrary to the suggestion of the Court of Appeals (Op. at 10), this affirmative defense was in response to defendants' Count I–Partition. The defense alleged that Carpenter had "taken revenue from the property in question" [tenancy-in-common property] in an "unauthorized manner" and had wrongfully refused to pay the IRA despite written demand. The allegation was not limited to improper taking of partnership revenue or property as the Court of Appeals suggests. Other evidence was presented to the trial court, as it was discovered, as outlined above including Carpenter's refusal to pursue sale opportunities after he had listed all the Block 105 Property for sale. He then maneuvered to benefit from his mismanagement by purchasing the land through partition at a price so low it shocked the Trial Court's conscience, and that he had testified was far below market value. This was bad faith and inequitable conduct.

While partition in Missouri is statutory, it is also governed by historic roots in equity and courts apply equitable principles in partition proceedings. *Phelps v. Domville*, 303 S.W.2d 601, 605 (Mo. banc 1957); *Nelson v. Emmert*, 105 S.W.3d 563, 568 (Mo. App. S.D. 2003); *Devoto v. Devoto*, 31 S.W.2d 805, 807 (Mo. 1930); *Devoto v. Devoto*, 39 S.W.2d 1083, 1084 (Mo. App. E.D. 1931). Chapter 528 makes clear that partition is an equitable remedy.

One with unclean hands is barred from obtaining equitable relief in the matter. *McKnight v. Midwest Eye Inst. of Kansas City, Inc.*, 799 S.W.2d 909, 917 (Mo. App. W.D. 1990), *Cohn v. Century Venture Dev. P'ship*., 938 S.W.2d 647, 650 (Mo. App. E.D. 1997); *Hardesty v. Mr. Cribbin's Old House, Inc.*, 679 S.W.2d 343, 348 (Mo. App. E.D. 1984). The doctrine of unclean hands requires that a party coming into a court of equity must have acted in good faith as to the subject matter of the lawsuit. *See Crawford v. Detring*, 965 S.W.2d 188, 193 (Mo. App. E.D. 1998). This Court has determined that the doctrine should be applied when it promotes right and justice by considering all of the facts and circumstances of a particular case. *Durwood v. Dubinsky*, 361 S.W.2d 779, 791 (Mo. 1962). A party who participates in inequitable activity regarding the issue for which it seeks relief will be barred by its own misconduct from receiving relief. *City of Kansas City v. New York-Kansas Bldg. Assocs., L.P.*, 96 S.W.3d 846, 862 (Mo. App. W.D. 2002).

Evidence of Carpenter's unclean hands was substantial and uncontroverted. It is undisputed that beginning in 1985 Carpenter managed the entire Block 105 Properties, including the parking lot business conducted on the portion that became tenancy-in-

common property. This property is subject to the partition action. This is exactly what the Trial Court allowed him to accomplish. Carpenter refusing to cooperate in the voluntary sale of the property, even when he claimed to be "winding up" the business affairs of Broadway-Washington when combined with other evidence of other misconduct, (Final Judgment at ¶ 13, establishing Carpenter wrongfully withheld from Fredericks' IRA its share of monies generated from the business he managed on the tenancy-in-common site, Carpenter refusing to disclose financial information about that business until ordered to do so by the court, stripping the business bank accounts clean by endless and undisclosed payments to himself), rises to a level of unclean hands sufficient to bar Carpenter from the equitable remedy of partition. Viewed as a whole, Carpenter's inequitable conduct with respect to management of the tenancy-in-common property should bar him (and his successor) from obtaining equitable relief with respect to that property.

The Court of Appeals was also incorrect in stating that the issue was not properly raised in the Trial Court. In addition to raising the affirmative defense of unclean hands with respect to the partition claim in plaintiffs' Answer, plaintiffs also raised this defense by motions and objections filed in the partition action. (Plaintiffs' Suggestions in Opposition to Motion for Appointment of Partition Commissioner, LF 377-386; Amended and Renewed Motion for Appointment of Receiver, Suggestions in Support of Plaintiffs' Amended and Renewed Motion for Appointment of Receiver and Suggestions in Opposition to Entry of Final Orders and Judgments of Partition of Real Estate). LF 508-522, 527-539, 540-547, 584-604.

The Court of Appeals was also incorrect in concluding that there was an insufficient nexus between Carpenter's wrongful conduct and the partition proceeding. The subject matter of this litigation was Carpenter's wrongful conduct with respect to management of the parties' jointly owned property. The defense of unclean hands goes to the very matter Carpenter sought relief, judicial sale of that property, and the judgment establishes his wrongful conduct in managing the tenancy-in-common property (failing to pay the IRA money entrusted to him as manager). The undisputed evidence established other bad faith conduct, principally his refusal to cooperate in potential sale of that property even after he had listed it for sale, and then attempting to acquire the property at a "low ball price" through partition.

This Court should reverse and remand on each of the above grounds, with instructions that no further actions be taken with respect to the counter-claim for partition. Further, for the reasons discussed in Point II, this Court should direct that the entire Block 105 Properties be placed in the hands of a receiver, who shall also act as a commissioner with power to sell the tenancy-in-common property, under supervision of the trial court. Mo. R. Civ. P. 96.19 *et seq*.

II. The trial court erred in refusing to appoint a receiver, pursuant to Rule 68.02 of the Missouri Rules of Civil Procedure, because the judgment denying the appointment of a receiver was against the weight of the evidence in that the evidence demonstrated that a receiver was necessary to protect the jointly owned property of Fredericks and Carpenter and Carpenter was engaged in a bitter dispute with and had initiated multiple lawsuits against the remaining general partners and Broadway-Washington, had breached numerous fiduciary duties, engaged in extensive self-dealing, excluded his minority general partner from partnership affairs, and failed to disclose material partnership financial and other information.

A. Standard of Review

The standard of review for the appointment of a receiver is set forth in *Murphy v. Carron,* 536 S.W.2d at 32. The judgment of the Trial Court is to be upheld unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence or it erroneously applies the law. *Id*. The standard of review for actions tried to the court applies to both actions at law and in equity. *Asbury v. Crawford Elec. Co-op., Inc.*, 51 S.W.3d 152, 154 (Mo. App. S.D. 2001).

The standards of no substantial evidence or against the weight of the evidence will result in reversal only when there is a firm belief that the decree or judgment is wrong. *State Farm Mut. Auto. Ins. Co. v. W. Cas. and Sur. Co.*, 477 S.W.2d 421, 424 (Mo. banc 1972). Reversal is also appropriate when the trial court erroneously applied the law.

Murphy, 536 S.W.2d at 32. This Court is to review the decision denying the appointment of a receiver and these facts under the standard of "abuse of discretion." *State ex rel Lund & Sager v. Mulloy*, 49 S.W.2d 1, 2 (Mo. 1932).

In the case before this Court, the weight of the evidence of Carpenter's misconduct while acting as managing partner, including engaging in extensive self-dealing, excluding other general partners from partnership affairs, failing to disclose material partnership information, and secretly suing his own partnership to recover monies which were the subject of this underlying litigation, establish that a receiver was "necessary to keep, preserve and protect" the partnership property. The Trial Court's failure to appoint a receiver when presented with this overwhelming evidence constitutes an abuse of discretion and the Trial Court's failure to do so mandates reversal by this Court.

B. Legal Standard for Appointment of Receiver

The standard for the appointment of a receiver is set forth in Mo. R. Civ. P. 68.02 which provides in part:

> **(a) Appointment of Receiver**. Whenever in a pending legal or equitable proceeding it appears to the court, that a receiver is necessary to keep, preserve and protect any business, business interest or property. . . the court … may appoint a receiver whose duty it shall be to keep, preserve and protect … that which the receiver is ordered to take into the receiver's charge.

While both Rule 68.02 and Mo. Rev. Stat. §515.240 give little guidance on the requirements and conditions precedent to the appointment of a receiver, appellate courts

have held that a receiver should be appointed in multiple ownership situations when parties have conflicting interests over the property, and when it is necessary to prevent manifest wrong, or imminent impending injury to the property or business. *Lynch v. Lynch*, 277 S.W.2d 692, 694 (Mo. App. 1955). The appointment of a receiver is a prerogative of equity which may be utilized by the court as a means of conserving property or assets for the benefit of multiple parties. *Id*.

C. Facts and Procedural History of Receivership Requests

Plaintiffs filed a series of motions seeking appointment of a receiver, each based on newly obtained evidence of self-dealing or other breaches of fiduciary duty by Carpenter. Appellants' first request for appointment of a receiver was made on November 26, 1997, (Request for Appointment of Special Master, for Accounting and Receivership) and supplemented on December 4, 1997, with appellants' Request for Appointment of Receiver. LF 257-366. The initial request for receiver asked for an evidentiary hearing citing the "joint venture" between the parties to develop both parcels of land, Fredericks' claims for breach of fiduciary duty, evidence of some $500,000 in improper distributions to Carpenter and improper and unauthorized distributions to Carpenter for "expenses." LF 257-351. The second request, filed a couple of weeks later, added additional evidence of Carpenters' failure to negotiate in good faith the sale of the properties when faced with a reasonable offer and Carpenters' attempt to obtain Fredericks' property interests at a below market price through a partition by judicial sale. The Trial Court failed to rule on either request and failed to set and conduct an evidentiary hearing on Fredericks' requests for the appointment of a receiver.

On October 1, 1999, plaintiffs filed their Renewed Motion for Appointment of Receiver after discovering that Carpenter was accelerating his diversion of partnership assets, secreting partnership information, refusing to participate in good faith negotiations to sell partnership property all while buying the "partitioned" parcel through a corrupted judicial sale. LF 445-471. This third request for the appointment of a receiver and to conduct an evidentiary hearing was likewise ignored by the Trial Court. Judge Shinn did not rule on any of the requests or motions for appointment of a receiver. These were denied by the Trial Court's interlocutory Judgment of January 14, 2000, denying all pending motions for appointment of a receiver. LF 496-502, ¶ 5.

After the entry of the January 2000 interlocutory judgment, plaintiffs then discovered the "secretly filed litigation" Carpenter brought against Broadway-Washington and the $224,355 confessed judgment in his favor. In this secret litigation, Carpenter sought to recover amounts which were subject of the ongoing litigation before Judge Shinn without notice to anyone, including Judge Shinn. Following this revelation, and after the confessed judgment had been set aside, on August 17, 2001, plaintiffs filed a Motion and Suggestions in Support of Amended and Renewed Motion for Appointment of Receiver setting forth the facts relating to the secret litigation. LF 523-539. Notwithstanding being confronted with uncontroverted evidence of Carpenter's egregious misconduct with respect to the secret litigation that Judge Daugherty had vacated for fraud, Judge Shinn took no action until entering the Final Judgment on January 11, 2002. LF 620.

Shortly after learning of the secret default judgment, plaintiffs also filed their Motion to Vacate and Reconsider Interlocutory Judgments Based on New Evidence–Secret Litigation. LF. 204-234. In this Motion and Suggestions plaintiffs detailed the history of the secret litigation, breaches of fiduciary duty by Carpenter in participating in the secret litigation and plaintiffs' damages. Plaintiffs pointed out that under Mo. Rev. Stat §359.251 Carpenter lacked legal authority to confess a judgment. That statute provides: "Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to … confess a judgment." Mo. Rev. Stat. §359.251. C-V's claims, in the secret lawsuit, for accrued expenses were compulsory counter-claims in this action. *See* Mo. R. Civ. P. 55.32(a). A self-dealing confession of judgment amounts to constructive fraud. *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997); *In re Estate of Snyder*, 880 S.W.2d 596, 600 (Mo. App. W.D. 1994); *Mahler v. Tieman*, 550 S.W.2d 623, 628 (Mo. App. E.D. 1977). It also constitutes common law fraud. *Martin v. McNeill*, 957 S.W.2d 360, 363 (Mo. App. W.D. 1997). Judge Shinn failed to rule on any of these motions.

D. Receivers Are Appropriate and Necessary in Partnership Disputes

Receivers are particularly appropriate in partnership disputes and are necessary as a practical matter in the event of dissolution of a contentious partnership. *Brannigan v. Schwabe*, 133 S.W.2d 1053, 1055 (Mo. App. E.D. 1939). (stating that receiver is proper where "the funds or property claimed to belong to the partnership is in danger" and "We do not see how there may be a dissolution and liquidation of this partnership without the aid of a receiver.")

Receivers have been appointed in partnership disputes on innumerable occasions, and often where a managing partner acts autocratically and treats partnership assets as his own. In *Curley v. Birgnoli Curley & Roberts Assoc.*, 746 F.Supp. 1208 (S.D.N.Y. 1989) (affirmed by *Curley v. Brignoli, Curley & Roberts Assoc.*, 915 F.2d 81 (2nd Cir. 1990)), limited partners sued a general partner and its chief executive officer claiming breach of fiduciary duties, misappropriation, mismanagement and misuse of partnership assets. Curly, 746 F.Supp. at 1210-1213. Plaintiffs sought removal of the general partner or, in the alternative, dissolution plus an accounting and damages (the latter on a derivative claim on behalf of the partnership). *Id*. The court noted that it was not reasonably practicable to carry on the business of the partnership, and concluded that the general partner and its CEO were "guilty of ... crass and autocratic conduct in the service of his selfish interest and in derogation of the interests of the limited partnership," so as to warrant appointment of a receiver and removal of the general partner. *Id*. at 1210. The opinion contains a lengthy summary of the general partner's misconduct, generally noting that he ran the business as if it were his own, denying access to partnership books and records, diverting opportunities to related entities, and paying his personal expenses with partnership funds. *Id*. This is what has occurred in the instant case.

In *Goll v. Kahler*, 422 S.W.2d 359 (Mo. App. W.D. 1967), the trial court appointed a receiver to harvest crops planted by defendant tenant. The evidence was that the parties orally agreed that seed and fertilizer would be paid 50/50 and corn raised would be divided 50/50. *Id*. However, the tenant treated the crop as his own and refused the plaintiff access to harvest his share. *Id.* at 361. The plaintiff alleged that his property

interests had been misappropriated and would continue to be misappropriated unless a receiver was appointed to protect his business interest and prevent loss of property right. *Id.* The court upheld appointment of a receiver as appropriate and necessary. *Id.*

In other jurisdictions courts generally have held that receivers are appropriate where there is disagreement or dissension between the partners, to prevent a partner from dissipating the partnership's property, where a partner has refused to render an accounting or provide voluntary access to the books or records. 65 Am. Jur. 2d, *Receivers* §§34-35, and cases cited therein.

E. Abuse of Discretion Not to Appoint a Receiver

The Trial Court was presented, over time, with abundant evidence of Carpenter's breaches of fiduciary duty and self-dealing, including refusal to provide financial information, diversion of funds, the filing of multiple lawsuits against Fredericks (the minority partner) and the secret lawsuit against the partnership and properties. During the entire time at issue, Carpenter continued to manage both properties (North Broadway and Mid-Broadway properties), operate them as a single parking lot, use the partnership bank account as the vehicle through which all cash flowed, and handle all financial affairs concerning each property, yet paid 100% of the cash flow to himself. There was ill will, as shown by the evidence. The $224,355 confession of judgment against Broadway-Washington was egregious misconduct. The Final Judgment constitutes adjudicated wrongful conduct in refusing to pay monies due the IRA and self-dealing, at least with respect to use of partnership funds to pay his personal townhouse expenses.

The business interests of plaintiffs have been and continue to be harmed and compromised through this endless self-dealing.

This case presents the Supreme Court with a clean set of facts to articulate when a trial court has abused its discretion by failing to appoint a receiver, when faced with warring parties. As a matter of law, when faced with evidence of such conduct the Trial Court should have no alternative but to conclude that Carpenter could not faithfully discharge fiduciary duties in conducting ongoing partnership affairs or in winding up its affairs under fiduciary standards. Appellants find no reported Missouri decision addressing a Trial Court's abuse of discretion in *failing* to appoint a receiver. This case presents this Court with the opportunity to clearly set the standard for appointing a receiver in partnership disputes. This is a classic case calling for appointment of a receiver to both assume control of all partnership and co-owned property and to sell that property under supervision of the court. There is ample existing precedent.

Receivers are empowered to sell properties. *State ex rel. Connors v. Shelton*, 142 S.W. 417, 421 (Mo. banc 1911); *State ex rel. Dean Automatic Tel. Co. v. Southern*, 267 S.W. 422 (Mo. App. W.D. 1924); *Davis v. Morgan Foundry Co.*, 23 S.W.2d 231 (Mo. App. W.D. 1930). A receiver often is necessary to effectuate winding up the dissolved partnership, and ancillary to a judicial accounting. As this Court noted in *City of St. Louis v. Golden Gate Corp.*, 421 S.W.2d 4, 7 (Mo. 1967), (and as cited in 4 Pomeroy's Equity Jurisprudence, 5th ed., 925, Sections 1332-1335), historically there are four general classes of cases in which a receiver is appropriate. One of them is:

> Where 'all of the parties are equally entitled to the possession of the property which is the subject matter of the controversy, but it is not just and proper, from the nature of the dispute and their relations with each other, that either one of them should be allowed to retain possession and control during the litigation,' such as suits between partners, partition between co-owners and suits between conflicting claimants of land.

Id.

This is the situation now before this Court. In addition to this being a bitter dispute between partners, one party seeks partition of another parcel held as tenants-in-common, and the entire relationship requires winding up. Missouri law does not support leaving the proven wrongdoer in possession and control during that process.

Appellants also find no reported Missouri decision plainly articulating the standards that a trial court must follow when presented with an application for appointment of receiver. However, the statute and Rule 68.02 set forth the conditions precedent to the appointment of a receiver. Mo. R. Civ. P. 68.02; Mo. Rev. Stat. §515.240. That is, whenever it appears to the Court that "a receiver is necessary to keep, preserve and protect any business, business interest or property . . . pending… any legal proceeding…" a receiver may be appointed. Mo. R. Civ. P. 68.02(a). The word "pending" does not contemplate that the decision of whether to appoint a receiver be deferred until the proceeding has been fully adjudicated.

Under Rule 68.02 (a), a trial court need not conduct an evidentiary hearing to determine whether it is probable that the moving party ultimately will prevail on the

merits (although that may be preferable, time permitting). A fair reading suggests that the trial court need only evaluate the evidence and information presented by the moving party and determine whether the business and/or property interests of the movant are likely to be adversely affected absent a receiver. If it appears likely that the moving party's business interests would be adversely impacted in the absence of a receiver, and if it further appears that no substantial prejudice will befall the other party, then the court should grant the application. This Court should firmly establish that in partnership cases involving unquestioned disputes among partners accompanied by *prima facie* evidence of self-dealing or other breaches of fiduciary duty by a managing partner, a receiver shall ordinarily be necessary to assume control of and protect partnership property. *Goll v. Kahler*, 422 S.W.2d 359 (Mo.App.W.D. 1967) (receiver necessary where one partner refused the other access to harvest his share of crops); *Muscarelle v. Castano*, 695 A.2d 330 (N.J 1997) (appointment of receiver was necessary to supervise sale of partnership building to prevent 60% partner in dissolved partnership from obtaining minority partners' interests at artificially low price). In those situations a receiver is necessary to protect the business interest of the disadvantaged partner and prevent loss of property rights. Moreover, trial courts should be instructed to render prompt rulings so that the property interests at issue may be timely protected.

Plaintiffs/appellants established through overwhelming evidence and multiple motions the need for an independent third party to take control of the jointly owned assets. The denial of a receiver resulted in the property of the partnership being damaged and justice was subverted, as Carpenter was and has been allowed to retain control

without judicial supervision thereby jeopardizing the jointly owned property. Now the Carpenter family, through ownership of the other Carpenter business entities (respondents), marches forward.

The Court of Appeals concluded the Trial Court's failure to rule on the three requests for receiver was not reversible error because the Court believed breach of fiduciary duty had not been shown. *Op.* at 13. The Court of Appeals' Opinion overlooks the Trial Court judgment in favor of appellants which establishes the contrary. The Trial Court judgment against Carpenter was based upon failing to pay money due the Fredericks IRA, and for improperly using partnership funds for his personal townhouse. Predicates for appointment of a receiver unquestionably were shown to exist and were in part confirmed by the Trial Court's Judgment, as well as the other evidence presented in support of the applications for a receiver, although the Court of Appeals is mistaken in presuming that one seeking a receiver must first prove his cause of action.

What is the appropriate remedy at this time? As shown in Point I, the Judgment of Partition must be reversed because of the failure of the trial court to follow Rule 96. However, such a result does not suggest that on remand the trial court ought merely engage in a technical exercise to "get it right" by following Rule 96 procedures anew. Rather, on this record viewed as a whole, the Trial Court should be directed that on remand a receiver be appointed to assume control of all the Block 105 Properties, and to act as a commissioner empowered to sell the property, pursuant to the supervision of the Trial Court, and wind up the parties' affairs. Mo. R. Civ. P. 96.19 *et seq.* Further, the

Trial Court should be directed to instruct the receiver to conduct the necessary judicial accounting ordered by the Trial Court, which was not completed while this matter was in the Trial Court[10] and that said receiver recommend to the Trial Court the appropriate distribution of sale proceeds, allocation of expenses, adjustments to capital accounts as necessary, and the like, in winding up the parties' affairs. Finally, the costs of receivership should be ordered borne by defendants-respondents.

[10] A judicially supervised accounting is required to establish amounts owed by the Carpenter entities to the partnership, all other related charges and adjustments necessary to conclude winding up the partnership. The Final Judgment ordered an accounting, but it should have occurred while this matter remained in the Trial Court, so that issues arising therefrom could be reviewed in this appeal. This did not happen. Similarly, independent financial review is required. An independent judicially supervised accounting, which appellants suggest be handled by the appointed receiver, "gives the partners the right to a complete and systematic financial review... The tender of summary information, such as tax returns and financial statements does not constitute a formal account." Bromberg & Ribstein, *Partnerships*, § 6.08, pp. 6:110-111; Mo. Rev. Stat. §§358.220 and 359.251.

III. The Trial Court erred by entering judgment in favor of defendants on the claims for breach of fiduciary duty (counts three, eight and fifteen), conversion (counts nine and eighteen) and constructive trust (counts ten and nineteen), because the Trial Court's judgment was against the weight of the evidence in that the evidence established that Carpenter engaged in extensive self-dealing, excluded Fredericks from partnership affairs, refused to pay monies due to Fredericks and refused to cooperate in attempts to sell the property.

A. Standard of Review

The standard of review is set forth in *Murphy v. Carron,* 536 S.W.2d at 32. The judgments of the Trial Court are to be upheld unless there is no substantial evidence to support the judgment, or the judgment is against the weight of the evidence or erroneously applies the law. The standard of review for actions tried to the court applies to both actions at law and in equity. *Asbury v. Crawford Elec. Co-op., Inc.*, 51 S.W.2d 152, 154 (Mo. App. S.D. 2001). The standards of no substantial evidence or against the weight of the evidence will result in reversal only when there is a firm belief that the decree or judgment is wrong. *State Farm Mut. Auto. Ins. Co. v. W. Cas. and Surety Co.*, 477 S.W.2d 421, 424 (Mo. banc 1972).

B. Carpenter's Actions Are Measured by Fiduciary Standards

While Broadway-Washington Associates is a Missouri limited partnership, the rules regarding the rights, powers and restrictions of partners generally are equally

applicable to a general partner in a limited partnership. *Anchor Centre Partners v. Mercantile Bank*, 803 S.W. 2d 23, 31 (Mo. banc 1991); Mo. Rev. Stat. §359.251 (1994). The standard of conduct applicable to partners as fiduciaries is long settled. In *In re Cupples*, 952 S.W.2d 226, 235-36 (Mo. banc 1997), this Court quoted with approval Justice Cardozo's famous pronouncement of the rule in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928):

> A partner's fiduciary duty includes the duty to be candid concerning business opportunities, the duty to be fair, the duty not to put self-interest before the interests of the partnership, and the duty not to compete with the partnership in the business of the partnership. Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions…Only by this has the level of conduct of fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

See also Florida v. Wilkerson, 247 S.W.2d 678, 682 (Mo. 1952); *Estate of Markey*, 922 S.W.2d 87, 92 (Mo. App. W.D. 1996).

Mo. Rev. Stat. §358.210 (1) states: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property." No statement of a partner's fiduciary duty could be clearer.

It is well established that breach of fiduciary duty is a tort. The rule is articulated in Restatement (Second) of Torts § 874: "One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Mo. Rev. Stat. §358.210 and §359.521 expressly impose these duties on general partners. Fiduciary duty requires "utmost good faith," full disclosure and fairness to the partnership in every aspect of a partner's activities. *See Groh v. Shelton,* 428 S.W.2d 911, 916 (Mo. App. S.D. 1968).

Not only is Carpenter obliged to discharge his obligations as a fiduciary, but an even higher standard applies to partners entrusted with managerial responsibilities. *Bass v. Daetwyler*, 305 S.W.2d 339, 345 (Mo. App. E.D. 1957) (managing partner burden to make faithful and true accounting); *Bovy v. Graham, Cohen & Wampold*, 564 P.2d 1175, 1178 n. 3 (Wash. Ct. App. 1977) ("managing partner…occupied a higher fiduciary position and had the burden of dispelling all doubts" regarding his conduct, including a "fiduciary duty of full disclosure," which "even though personal relations between partners have deteriorated….that fact does not relieve the partners of their fiduciary

obligations"); *Laurence v. Flashner Med. P'ship.*, 565 N.E.2d 146, 152 (Ill. App. Ct. 1990) (partner has "burden to prove that he has been completely frank and honest with his partner, and has made full disclosure" and "managing partner….obligation to deal fairly and openly and disclose fully is heightened"); *Wirum & Cash, Architects v. Cash*, 837 P.2d 692, 701-02 (Alaska 1992) ("full and complete disclosure required" and "other partner's approval and consent" based upon "detailed knowledge" and higher standard applied to "managing" partner).

Fiduciary duties are owed to the partners as well as the partnership. *Meinhard*, 164 N.E. 545; *Gibson v. Deuth*, 220 N.W.2d 893, 896 (Iowa 1974); *Hayes v. Northern Hills Gen. Hosp.*, 590 N.W.2d 243, 253 (S.D. 1999); *Boxer v. Husky Oil Co.*, 429 A.2d 995 (Del. Ch. 1981) (general partner in limited partnership).

Fiduciary standards also apply to Carpenter-Vulquartz Redevelopment Corp. ("C-V"), engaged as contract manager of the partnership's "Projects." Restatement (Second) of Agency §13 (1957); *Knopke v. Knopke*, 837 S.W.2d 907, 915 (Mo. App. W.D. 1992); *Am. Button Co. v. Weishaar*, 170 S.W.2d 147, 152 (Mo. App. S.D. 1943); *State ex rel. Cockrum v. Southern*, 83 S.W.2d 162 (Mo. App. W.D. 1935); *Johnston v. McCluney*, 80 S.W.2d 898 (Mo. App. E.D. 1935).

Finally, fiduciary duties continue following partnership dissolution and during the winding-up period. The partnership is not terminated upon dissolution but continues until the winding up of partnership affairs is completed. *See* Mo. Rev. Stat. §§358.290, 358.300 and 359.471; *see also 8182 Maryland Assoc., Ltd. P'ship. v. Sheehan*, 14 S.W.3d 576, 580 (Mo. banc 2000). The existence of duties during winding up is a consequence

of the continuance of the partnership during this period. Carpenter claimed to be acting as managing partner while winding-up the affairs of Broadway-Washington. 7/16/98 TR 716:13-717:6. Even if the partners are not cooperating or are involved in disputes, fiduciary duties continue since the conditions that initially gave rise to the fiduciary duty still exist. *Lund v. Albrecht*, 936 F.2d 459 (9th Cir. 1991) (applying California law, partner's fiduciary duty to co-partner continued through negotiations until signing of agreement for purchase of partner's interest).

C. Carpenter Failed to Meet His Burden to Prove the Propriety Of His Self-Dealing by Clear and Convincing Evidence

A fiduciary alleged to have engaged in self-dealing bears the burden to prove, by clear and convincing evidence, that his conduct was proper. *In re Miller*, 568 S.W.2d 246, 251 (Mo. banc 1978); *Dunham v. Dunham*, 528 A.2d 1123, 1134 (Conn. 1987) (citing Missouri decision *In re Miller*, 568 S.W.2d 246).[11] This burden includes two

[11] In the Trial Court Fredericks argued that the conduct of the parties constituted, as a matter of law, a joint venture for the operation of a parking lot on the tenancy-in-common properties. The property continued to be utilized for and operated as a surface parking lot both before and after Fredericks' 10% acquisition. Carpenter continued to be responsible for management of that operation. 7/98 TR 986:8-988:20. By so managing the parking lot business at the 90/10-owned "North Broadway" site, a joint venture exists between the co-tenants, imposing fiduciary duties on Carpenter with respect thereto. Mo. Rev. Stat. §358.060; *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. App. E.D. 1996); *Troy Grain & Fuel Co. v. Rolston*, 227 S.W.2d 66, 68 (Mo. App. W.D. 1950); *Bernard McMenamy*

components. First, there is an obligation to prove prior full disclosure to other partners of the challenged self-dealing. *Ebest v. Bruce*, 734 S.W.2d 915, 922 (Mo. App. E.D. 1987); *Moser v. Williams*, 443 S.W.2d 212, 215 (Mo. App. E.D. 1969). Missouri courts have also stated that such failure can constitute fraud. *See Kansas City Downtown Minority Dev. Corp v. Corrigan Assocs. Ltd. P'ship.*, 868 S.W.2d 210, 219 (Mo. App. W.D. 1994); *Faron v. Waddell & Reed, Inc.*, 930 S.W.2d 508, 511 (Mo. App. E.D. 1996) (affirmative duty of fiduciary to disclose self-interest in transaction). In this case, Carpenter admitted that he did not make such disclosures. The non-disclosures were intentional and mischievous. The "secret default judgment" Carpenter obtained against Broadway-Washington would, if legitimate, have placed C-V as a "third party creditor" ahead of any liquidating distributions to other partners, permitted C-V to collect the $224,355 plus

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Contractor, Inc. v. Kitchen, 692 S.W.2d 817 (Mo. App. E.D. 1985). However, regardless of whether a joint venture is determined to exist, by reason of his management of the entire business, Carpenter owed fiduciary duties to Fredericks (and his IRA) with respect to operating the tenancy-in-common property. The duty exists by reason of his being the managing general partner of Broadway-Washington, through which all cash flowed from the integrated parking lot business. Moreover, in Missouri even tenants-in-common occupy a confidential relationship requiring other than "morals of the marketplace" treatment of one another. *Gilliam v. Gohn*, 303 S.W.2d 101 (Mo. 1957), *White v. Roberts*, 637 S.W.2d 332 (Mo. App. E.D. 1982) (divorced husband and wife owning tenancy-in-common property).

interest "off the top". *See* Mo. Rev. Stat. §359.481 (creditor payments have priority over partner distributions on winding up).

Second, the fiduciary bears the burden of showing the *fairness* of the challenged transaction to the partnership. *See Davidson v. I.M. Davidson Real Estate & Invest. Co.*, 155 S.W. 1, 8-9 (Mo. 1913); *Englesmann v. Holekamp*, 402 S.W.2d 382, 389 (Mo. 1966). In *Moser*, one partner had control over the sole partnership property, a parcel of land, and sold it on terms that disadvantaged the other partners without their knowledge. 443 S.W.2d 212. The court found the selling partner had breached his duties and had not met his burden of proving "utmost good faith," disclosure and fairness. *Id.* Any doubts regarding self-dealing are resolved against the fiduciary. *Daetwyler*, 305 S.W.2d at 345; *Adams v. Mason*, 358 S.W.2d 7, 15 (Mo. 1962); *Morrison v. Asher*, 361 S.W.2d 844, 850 (Mo. App. S.D. 1962).

In *Warren v. Warren*, 784 S.W.2d 247 (Mo. App. W.D. 1989), two brothers operated two partnerships, one a funeral home and the other a tree trimming service. The court ordered an accounting and dissolution of one partnership based upon breach of fiduciary duty by exclusion from its affairs. *Id.* at 256. The court held that the act of changing the combination on the safe demonstrated an intent to change the relationship of the parties as of that date. *Id*. The court also held that an action for conversion would lie for funds obtained in breach of fiduciary duty. *Id*. at 253. Carpenter's far more egregious conduct more than meets such a test.

Missouri law also requires a general partner to keep accurate books and records and to keep them accessible to other partners–an aspect of the duty of disclosure.

Knopke, 837 S.W.2d at 922; *see also Lake Ozark Constr. Indus., Inc. v. North Port Assocs.*, 859 S.W.2d 710, 715 (Mo. App. W.D. 1993); Mo. Rev. Stat. §§358.190 and 358.200. Failure to permit inspection and copying in a timely fashion is a separate breach of fiduciary duty. *Curley*, 746 F.Supp. at 1215 ; *Miltland Raleigh-Durham v. Myers*, 807 F.Supp. 1025, 1060 (S.D. N.Y. 1992) (refusal to provide information to limited partners). The more specific duty to "render on demand" full and complete information requested by a partner is spelled out in Mo. Rev. Stat. §358.200 which provides "partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." The Trial Court was obliged under Missouri law to order Carpenter to give plaintiffs access to partnership information. 2nd Sup. LF 1-5. Plainly, the evidence concerning Carpenter's breach of fiduciary duty as set forth in plaintiffs motion for appointment of receiver establishes that Carpenter failed to meet these standards to render trust and full information to Fredericks.

It is otherwise well settled in partnership law that, absent an express agreement among the partners, no partner is entitled to compensation for services on behalf of the partnership. Mo. Rev. Stat. §358.180(6). The evidence shows that no such agreement existed. The Broadway-Washington partnership agreement expressly prohibited compensation to partners for services:

> None of the Partners hereto shall make any charges against the Partnership for any ordinary overhead expenses or for time or effort which may be

> expended in connection with the performance of the functions of the Partnership by any such Partner . . .

App. A40-A41, TX 1. Neither the partnership agreement nor any other agreement of the partners provides a basis for Carpenter's claims of entitlement to any of the disputed payments or charges for expenses for running the business including office, rent charges or town house expenses. The overwhelming evidence of his unauthorized taking of partnership funds constitutes breach of fiduciary duty and conversion, as a matter of law.

Carpenter's attempt to justify his charges on the "first year budget" provision in the Management Agreement and/or by his managerial role under the partnership agreement is not supported by law. A similar attempt was soundly rejected in *Laurence*, where the managing partner sought to justify self-dealing based upon broad powers granted him in the partnership agreement. 565 N.E.2d 146. Despite this grant of broad managerial authority, the court found the partner to have "the burden of proving his innocence." *Id*. at 152-53. *Accord Labovitz v. Dolan*, 545 N.E.2d 304, 313 (Ill. App. Ct. 1990) (fiduciary duty not altered by provision in partnership agreement granting sole discretion to managing partner).

Judge Shinn determined that Carpenter's charges to the partnership (for town house expenses) were improper. Appendix A4, at ¶ 7. The judgment also established liability for nonpayment of money due Fredericks' IRA. *Id.* at ¶ 13. There is no cross-appeal. Beyond that, the overwhelming and undisputed documentary evidence, most particularly the "secret confessed judgment" against the partnership, as discussed *supra*, establishes as a matter of law that Carpenter not only engaged in self-dealing, but that he

failed to meet his burden to prove that the challenged self-dealing was previously disclosed to, and was fair to, the partnership and other partners. It was not disclosed and it was not fair and the trial court erred in applying the law of fiduciary duty.

The Court of Appeals was incorrect in stating that "a breach of fiduciary duty did not occur." *Op*. at 13. This Court should determine that breach of fiduciary was established, and instruct the Trial Court that on remand the amount of damage be established through the judicial accounting to be conducted by an appointed receiver.

D. Carpenter's Self-Dealing Constitutes Conversion

Conversion is the tortious interference with the right of ownership or possession of personal property. *Ensminger v. Burton*, 805 S.W.2d 207, 210-11 (Mo. App. W.D. 1991); *Mickelson v. Airmen, Inc.*, 712 S.W.2d 714, 717 (Mo. App. W.D. 1986). While conversion typically involves specific chattels, the tort of conversion lies for money entrusted to a party and misapplied by that party. *L & W Eng'g Co., Inc. v. Hogan*, 858 S.W.2d 847, 850 (Mo. App. W.D. 1993); *Am. Nursing Res., Inc. v. Forrest T. Jones & Co., Inc.*, 812 S.W.2d 790, 799 (Mo. App. W.D. 1991); *Bierman v. Gus Shaffar Ford, Inc.*, 805 S.W. 2d 314, 318 (Mo. App. S.D. 1991).

Partnership funds and the Fredericks IRA's funds were entrusted to Carpenter to manage. He used the partnership's bank accounts to do so. His undisclosed and unauthorized takings of partnership cash and refusal to pay IRA monies owed following written demands (without any contemporaneous response or explanation for his silence), as outlined above, constitutes conversion. While Carpenter argued that his after-the-fact financial statements showed IRA funds as "Rent Held" and a liability of the partnership,

the facts show that there was no cash held as Carpenter had stripped it out. Thus, the act of conversion was complete. *Warren*, 784 S.W.2d at 253. The Trial Court erred in failing to so find, and its judgment must be reversed with directions that the Trial Court on remand determine the amount of monies converted and enter judgment for plaintiffs accordingly.

E. Funds Improperly Taken Are Held in Constructive Trust

A constructive trust is an appropriate remedy to impose on funds appropriated by fiduciaries. *State Auto & Cas. Underwriters v. Johnson,* 766 S.W.2d 113, 124 (Mo. App. S.D. 1989); *Cave v. Cave*, 593 S.W.2d 592, 597 (Mo. App. W.D. 1979). Constructive trusts are particularly suited for appropriated partnership funds. *Schneider v. Schneider,* 146 S.W.2d 584, 589 (Mo. 1941). Proof of fraud is not required. *White v. Mulvania*, 575 S.W.2d 184, 187 (Mo. banc 1978); *Swon v. Huddleston*, 282 S.W.2d 18, 25 (Mo. 1955).

The Trial Court failed to impose a constructive trust on any of the funds taken by Carpenter. This Court should reverse and order that on remand the Trial Court enter an order imposing a constructive trust on all monies taken by Carpenter and/or his business entities, pending final Trial Court decision after a judicial accounting.

CONCLUSION

This is an extraordinary case in which a managing partner (who happened to be a lawyer, and thus well trained in fiduciary requirements), acted autocratically and with complete disregard for his minority partner and his fiduciary responsibilities. Surely the standards articulated by Justice Cardozo decades ago prevail and resonate in this Court.

Appellants urge that "the level of conduct of fiduciaries will not be lowered by any judgment of this Court."

For the reasons set forth herein, this Court should:

1. Reverse the Final Judgment and Order of Partition and remand with directions to set aside the Court Administrator's Deed in Partition and dismiss Count One of the Counter-Claim or, at minimum, with directions to conduct any further partition procedure in accordance with Rule 96;

2. Reverse the Final Judgment denying application for appointment of a receiver, and remand with directions to the Trial Court to appoint a receiver with power to sell the parties' Block 105 Properties, and to wind up the affairs of Broadway-Washington Associates and the relationships created in the tenant-in-common properties, pursuant to procedures to be established by and under the supervision of the Trial Court;

3. Reverse the Final Judgment and remand with directions to find the defendants breached their fiduciary duties, converted monies rightfully belonging to Broadway-Washington Associates and Fredericks, and hold the same in constructive trust, and to conduct further proceedings to establish the amounts properly due and owing pursuant thereto;

4. Direct the Trial Court to conduct any and all further proceedings consistent with the foregoing; and,

5. Award appellants their costs herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing, along with a floppy disk containing same, was served this __ day of February, 2005, on: Rhonda Smiley, Esq., The Skelly Building, 605 W. 47th Street, Suite 350, Kansas City, MO 64112-1905, Attorney for: The Carpenter 1985 Family Partnership, Ltd., Carpenter-Vulquartz Redevelopment Corporation, the Marital Community Property of Allan R. and Theodora D. Carpenter, Allan R. Carpenter, The Carpenter 427 West 12th Street Partnership, Ltd., Broadway-Washington Associates, Ltd., Golden Gateway Building Company, Dupage Properties, Inc., St. Francis Associates, L.P., Fleishhacker Properties and Mortimer Fleishhacker by sending a copy via: ☐ U.S. Mail, postage pre-paid; ☐ Fax; ☐ e-mail; ☐ Federal Express; ☐ Hand-delivery.

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Attorney for Plaintiffs/Appellants

CERTIFICATE PURSUANT TO RULE 84.06(b)

The undersigned, attorney for appellant, hereby certifies that this Substitute Brief complies with Mo. R. Civ. P. 55.03, the limitations contained in Rule 84.06(b), contains 14,518 words and 1,225 lines of type, as reported by counsel's word processing program, and that all disks and/or CDs filed or served with the brief were scanned for viruses with Norton anti-virus and are virus free according to that program.

_____

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